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James N. Hatten, Clerk
By: [signature] Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LIFT MEDIA, LLC,

Plaintiff

v.

GREATER THAN GATSBY, LLC,

Defendant

GREATER THAN GATSBY, LLC,

Counter Claimant

v.

LIFT MEDIA, LLC,

Counter Defendant

GREATER THAN GATSBY, LLC,

Third-Party Plaintiff

v.

ROBERT HASH, JR. & ANDREW EGENES,

Third-Party Defendants

CIVIL ACTION NO.
1:14-CV-3470-ODE

ORDER

This copyright infringement case comes before the Court on Third-Party Defendants Andrew Egenes and Robert Hash, Jr.'s Motion to Strike Third-Party Claims [Doc. 111], Third-Party Defendants Egenes and Hash's Motion for Summary Judgment [Doc. 111], Defendant Greater than Gatsby, LLC's (hereinafter "Gatsby") Motion for Reconsideration [Doc. 159], and Defendant Gatsby's Motion to Submit Supplemental Report [Doc. 160]. For the reasons detailed below, Egenes and Hash's Motion to Strike Third-Party Claims [Doc. 111] is GRANTED, Egenes and

Hash's Motion for Summary Judgment [Doc. 111] is GRANTED, Gatsby's Motion for Reconsideration [Doc. 159] is DENIED, and Gatsby's Motion to Submit Supplemental Report [Doc. 160] is DENIED.

## I. Procedural Background

This case arises out of an oral agreement between Lift and Gatsby for Lift to provide Gatsby with website consulting, construction, and optimization services. The original Complaint in this case was filed October 28, 2014 [Doc. 1]. That Complaint brought claims for: (1) declaratory relief, (2) breach of contract, (3) anticipatory breach of contract, (4) bad faith, and (5) alter ego [Id.].

On May 15, 2015 Gatsby and its Chief Executive Officer Hohweiler filed a Counterclaim against Lift and Third-Party Complaint against Lift manager Egenes [Doc. 22]. The Counterclaim/Third-Party Complaint alleged causes of action for: (1) breach of contract against Lift, (2) misrepresentation by Lift and Egenes, (3) fraud against Lift and Egenes, (4) fraud in the inducement against Lift and Egenes, and (5) alter ego against Egenes [Id.]. On October 22, 2015 Hohweiler and Gatsby filed a Motion under Fed. R. Civ. P. 15(a) for Leave to Amend the Counterclaim and Third-Party Complaint [Doc. 42]. In their Motion, Hohweiler and Gatsby sought to amend the Counterclaim/Third-Party Complaint to reflect their new allegation that Lift had not yet been validly formed at what they alleged was the date of the Lift-Gatsby agreement, and to add Lift manager Hash as an additional Third-Party Defendant [Id. at 3]. On November 5, 2015 Lift and Egenes filed a Response stating that they did not oppose amendment of the Counterclaim/Third-Party Complaint [Doc. 45], and on November 19, 2015 the Court granted the Motion for Leave to

Amend [Doc. 46]. The First Amended Counterclaim and Third-Party Complaint was filed effective the same day [Doc. 47].

Lift's Amended Complaint [Doc. 35], which was filed June 22, 2015, alleged six causes of action: (1) declaratory judgment of copyright ownership, (2) copyright infringement, (3) misappropriation of trade secrets, (4) unjust enrichment, (5) abuse of process, and (6) alter ego [Id.]. The Amended Complaint asserted claims against Gatsby, its Chief Executive Officer Joshua Hohweiler, and Does 1-10 [Id.]. In an Order entered August 14, 2015 ruling on a Motion to Dismiss by Defendants [Doc. 34], the Court dismissed the misappropriation, abuse of process, and alter ego claims, and dismissed Does 1-10 [Doc. 38]. On April 25, 2016 Lift filed a Motion for Leave to File a Second Amended Complaint [Doc. 92], which the Court denied [Doc. 118]. Thus, Lift currently has claims against Gatsby for declaratory judgment of copyright ownership, copyright infringement, and unjust enrichment.

On December 4, 2015 Egenes and Lift filed a Motion to Dismiss portions of the First Amended Counterclaim and Third-Party Complaint [Doc. 51]. On December 21, 2015 Gatsby filed a Second Amended Counterclaim against Lift and Third-Party Complaint against Egenes and Hash, which alleged six causes of action [Doc. 53]. Those causes were: (1) breach of contract, (2) misrepresentation, (3) fraud, (4) fraud in the inducement, (5) unjust enrichment, and (6) declaratory judgment of copyright ownership [Id.].

On June 3, 2016 Third-Party Defendants Egenes and Hash filed a Motion for Summary Judgment as to all claims against them [Doc. 111]. In their Brief in Support of the Motion, Egenes and Hash cite five reasons why summary judgment should be granted: (1) Hash and Egenes were not properly impleaded under Fed. R. Civ. P. 14, (2) Gatsby's Third-Party Complaint against Hash was time-barred under Fed. R. Civ. P. 14, (3) Egenes could not be a party to the oral contract because Hash was not his agent, (4) Gatsby has not proved a contract between it, Hash, and Egenes, and (5) Gatsby cannot recover the damages it alleges [Doc. 111-2]. On June 24, 2016 Gatsby filed a Response in Opposition [Doc. 124]. Egenes and Hash filed a Reply on July 8, 2016 [Doc. 131].

On October 13, 2016 the Court issued an Order which construed the improper impleader argument in Egenes and Hash's Motion for Summary Judgment as a Motion to Strike Third-Party Claims under Fed. R. Civ. P. 14(a)(4), ordered Gatsby to Show Cause why the Motion to Strike Third-Party Claims should not be granted, and deferred Egenes and Hash's Motion for Summary Judgment until after Gatsby's Response to the Order to Show Cause [Doc. 154]. On October 31, 2016 Gatsby filed a Response [Doc. 158]. On November 14, 2016 Egenes and Hash replied withdrawing the improper impleader ground from their Motion for Summary Judgment, and asking the Court to deny their Motion to Strike, and grant their Motion for Summary Judgment [Doc. 163 at 3]. Accordingly, Egenes and Hash's Motion for Summary Judgment [Doc. 111] is again before the Court.

On October 31, 2016 Gatsby filed a Motion for Reconsideration [Doc. 159]. On November 14, 2016 Lift, Egenes, and Hash filed a Response in Opposition [Doc. 161]. On November 18, 2016 Gatsby filed a Reply [Doc. 164].

On October 31, 2016 Gatsby filed a Motion to Submit Supplemental Report [Doc. 160]. On November 14, 2016 Lift, Egenes, and Hash filed a Response in Opposition [Doc. 162]. Gatsby replied on November 21, 2016 [Doc. 165]. Accordingly, these four Motions are now ripe before the Court.

## II. Undisputed Facts

The following material facts are not in dispute unless noted. Lift is a Georgia LLC, and Gatsby is a Texas LLC [Doc. 123, *Third-Party Pl's Resp. To Movant's Stmt. of Mat. Facts*, at 2]. Lift applied for and received its Federal Identification Number from the Internal Revenue Service on September 27, 2013 [Id. at 7]. Lift filed Articles of Organization with the Georgia Secretary of State on September 28, 2013, and Lift's Certificate of Organization was issued by the Georgia Secretary of State effective October 1, 2013 [Id.].

Gatsby is a purported owner of Photoshop actions and Lightroom presets, which simplify the processing of photos within Adobe software [Id. at 3]. There was some type of understanding between the parties [id. at 9-10], which contemplated that Lift would build a website, and use it to sell Gatsby's photography add-ons [id. at 15-16]. Lift provided this service from November 8, 2013 to June 25, 2015 [Id.]. From November 8, 2013 to May 31, 2015 Gatsby paid Lift a 20% share of revenues from Gatsby's website sales [Id. at 20-21].

The parties agree that Lift sent Gatsby a letter on June 5, 2015, but dispute what the letter said. Lift says the letter was a "Settlement Offer, Notice of Termination of E-Commerce Consulting Services, Notice of Copyright Infringement, and Cease and Desist letter . . . which required Defendant Gatsby to either license said intellectual property from [Lift] and execute a written independent contractor agreement for the provision of e-commerce consulting services or terminate all use of said intellectual property" [Doc. 35 ¶ 29]. Gatsby admits it received the letter, but doesn't agree with the duties Lift says the letter imposed [Doc. 40 ¶ 29]. Gatsby's counsel sent Lift a letter on June 26, 2015 notifying Lift of termination of the oral agreement, and on the same day, Gatsby launched an ostensibly new website to which its domain greaterthangatsby.com was directed [Doc. 123 at 21-22]. According to Hohweiler's testimony, at no time did Egenes, Hash, or Lift assign or convey any interest in intellectual property by written agreement to Gatsby [Id. at 25].

Additional disputed facts abound. Gatsby contends that the oral agreement was entered into on September 27, 2013 [Doc. 125, *Third-Party Pl's Stmt. Of Addt'l Mat. Facts*, at 2], and was actually between Gatsby, Egenes and Hash, because Lift had not yet been organized under Georgia law [Doc. 123 at 11-14]. Gatsby further claims that it believed it was contracting with Hash and Egenes as individuals; Hash and Egenes contest both the veracity and reasonableness of that belief [Doc. 131-1 at 6].

Hash and Egenes contest the September 27 contract date, and dispute when Lift came into being [Id. at 4-5]. Hash and Egenes claim that they were never parties to any agreement with Gatsby or Hohweiler, and were never paid directly by Gatsby or Hohweiler, but Gatsby argues that because Lift was formed after what Gatsby contends was the date of the oral agreement, Hash and Egenes are liable either directly as parties to the agreement, or under a pre-incorporation theory [Doc. 123 at 11-14, 17-18]. Gatsby also claims it paid Lift at the direction of Hash and Egenes [Doc. 125 at 3]. Egenes and Hash contend that the agreement covered e-commerce consulting, but Gatsby says it covered more, including building a website for Gatsby, and devoting 100% of Hash and Egenes' time to the Gatsby website [Doc. 123 at 14-15].

The parties strongly dispute who owns the website [see, e.g., id. at 3-5]. Hash and Egenes claim Lift filed for copyright registration of parts of the website with the United States Copyright Office, and the copyright was granted on November 17, 2014 [Id. at 24]. Gatsby, however, says it can neither affirm nor deny those claims because it has not yet received relevant discovery [Id.]. Hash and Egenes say they individually claim no ownership in the website, or website copyright [Id. at 26]. Gatsby, however, says that because the alleged date of contracting predates the organization of Lift, there remains a question as to who owns the website and the website copyright [Id.].

## III. Discussion

The Court discusses each of the Motions in turn. The Court begins by discussing Egenes and Hash's Motion to Strike Third-Party Claims [Doc. 111] and Motion for Summary Judgment [Doc. 111]. The Court then turns to Gatsby's Motion for Reconsideration [Doc. 159] and Gatsby's Motion to Submit Supplemental Report [Doc. 160].

### A. Egenes and Hash's Motion to Strike Third-Party Claims and Motion for Summary Judgment

In support of their Motion for Summary Judgment, Egenes and Hash argue that: (1) Hash and Egenes were improperly impleaded under Fed. R. Civ. P. 14, (2) Gatsby's Third-Party Complaint against Hash was time-barred under Fed. R. Civ. P. 14, (3) Egenes could not be a party to the oral contract because Hash was not his agent, (4) Gatsby has not proved a contract between it, Hash, and Egenes, and (5) Gatsby cannot not recover the damages it alleged [Doc. 111-2 at 10-24]. In response, Gatsby argues that Hash and Egenes were properly impleaded, Gatsby's Third-Party Complaint was timely, Egenes was bound because he never repudiated the agreement, Hash and Egenes could be the parties on the Lift side of the Lift-Gatsby agreement because Lift did not incorporate before the contract, and Gatsby may seek the damages it has claimed [Doc. 124 at 5-25]. In reply, Hash and Egenes argue that they were improperly impleaded, Gatsby's impleader of Hash was barred by timeliness and service issues, Egenes did not have to repudiate the agreement because he was never a party to it, Lift's incorporation was not untimely because no binding acts occurred before incorporation, and Gatsby cannot seek the damages it wishes to pursue [Doc. 131 at 3-15].

The Court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted). "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Only after the moving party meets this initial burden does any obligation on the part of the nonmoving party arise. Chanel, Inc. v. Italian Activewear of Fla., Inc., 931 F.2d 1472, 1477 (11th Cir. 1991). At that time, the nonmoving party must present "significant, probative evidence demonstrating the existence of a triable issue of fact." Id. If the nonmoving party fails to do so, the moving party is entitled to summary judgment. United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991).

All evidence and justifiable factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1532 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." Anderson, 477 U.S. at 255. However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48 (emphases in original).

Ultimately, Egenes and Hash's argument in support of their Motion for Summary Judgment is that "they are in no way subject to liability to [Gatsby] as a matter of fact and law, and are entitled to the dismissal of each of the claims in the Second Amended Third-Party Complaint" [Doc. 111 at 1]. The Court agrees.

Under Fed. R. Civ. P. 14(a), "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." "Impleader, or third party practice, is only available when the third party defendant's liability is secondary to, or a derivative of, the original defendant's liability on the original plaintiff's claim." Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982) (citing United States v. Joe Grasso & Son, Inc., 380 F.2d 749, 751

(5th Cir. 1967)). For a third-party claim to be proper, then, the third-party defendant's liability to the third-party plaintiff/original defendant must depend upon the third-party plaintiff/original defendant's liability to the original plaintiff.

In this case, for Egenes and Hash to be proper third-party defendants, their liability to Gatsby must depend on Gatsby's liability to Lift. That is, Egenes and Hash must be liable to Gatsby for breach of contract and related claims if Gatsby is liable to Lift for copyright infringement and related claims. This chain of liability simply does not exist in this case. In fact, the liability Gatsby seeks to assert against Egenes and Hash is direct, not derivative, liability. Egenes and Hash are thus not proper third-party defendants in this case.

For a party to challenge improper impleader under Fed. R. Civ. P. 14, the party "may move to strike the third-party claim, to sever it, or to try it separately." Fed. R. Civ. P. 14(a)(4). The Court construed the improper impleader ground in Egenes and Hash's Motion for Summary Judgment as a Motion to Strike Third-Party Claims under Fed. R. Civ. P. 14(a)(4) [Doc. 154 at 5]. While the Court acknowledges that Egenes and Hash purported to withdraw the improper impleader argument from their Motion for Summary Judgment [Doc. 163 at 3], the Court agrees with Hash and Egenes--as analyzed above--that they were improperly impleaded in this matter. For those reasons, the Court agrees with the improper impleader ground of Egenes and Hash's Motion for Summary Judgment construed by the Court as a Motion to Strike Third-Party Claims. Accordingly, the Court GRANTS Egenes and Hash's Motion to Strike Third-Party Claims [Doc. 111] and thus GRANTS Egenes and Hash's Motion for Summary Judgment [Doc. 111].

### B. Gatsby's Motion for Reconsideration

In its Motion for Reconsideration [Doc. 159], Gatsby asks the Court to reconsider its October 11, 2016 Order [Doc. 153] excluding the testimony of Gatsby's expert witness, Thomas Chambers. In support of its Motion, Gatsby first argues that Chambers' experience in the then-nascent field of search engine optimization made him an expert, and that Chambers explained in his report and deposition how that experience led to his expert opinions [Doc. 159 at 3-6]. Gatsby then argues that the Court erred in finding that Chambers' claims of experience were undercut when he admitted that some of the experience he claimed came from working for a moving company, because he never claimed expertise from this experience [Id. at 6-8]. Third, Gatsby claims that Chambers' opinion was reliable under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) because it relied on sufficiently scholarly and reliable sources, provided methodology (or if it did not, that is Lift's fault), used relevant comparison groups, and provided the methodology and analysis for arriving at Chambers' estimation of losses to Gatsby [Id. at 8-24].

In response, Lift, Egenes, and Hash argue that Gatsby does not meet the standard for reconsideration [Doc. 161 at 4-10], and that Gatsby's Motion for Reconsideration is an abuse of process [Id. at 14-16]. In reply, Gatsby argues that Gatsby is allowed to file its Motion under the Federal Rules of Civil Procedure, and its Motion is not an abuse of process [Doc. 164 at 1-2, 10-15]. Gatsby further argues that reconsideration would be appropriate here because the Court misapprehended the expert materials [Id. at 2-8].

Under the Local Rules, a motion for reconsideration is to be filed only when a party or party's attorney believes it is "absolutely necessary," not as a "matter of routine practice." LR 7.2(E), NDGa. Under the Rule, a motion for reconsideration must be filed within 28 days of entry of the order or judgment for which reconsideration is sought. Id. The absolutely necessary standard is only met when reconsideration is supported by "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." Bryan v. Murphy, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003) (Martin, J.) (citing Jersawitz v. People TV, 71 F. Supp. 2d 1330 (N.D. Ga. 1999) (Moye, J.), Paper Recycling, Inc. v. Amoco Oil Co., 856 F. Supp. 671, 678 (N.D. Ga. 1993) (Hall, J.)). A motion for reconsideration is not to be used to show the court "how it 'could have done it better.'" Bryan, 246 F. Supp. 2d at 1259 (quoting Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995) (O'Kelley, J.)). A motion for reconsideration is also not to be used to repackage arguments already presented to, and dismissed by, the court. Bryan, 246 F. Supp. 2d at 1259 (citing Brogdon ex rel. Cline v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000) (Murphy, J.); Johnson v. United States, No. Civ. A. 1:96CV1757JOF, 1999 WL 691871 (N.D. Ga. July 14, 1999) (Forrester, J.)). Finally, a motion for reconsideration is not to be used to present legal theories or evidence that could have been presented earlier unless there is a reason for failing to make the earlier presentation. Bryan, 246 F. Supp. 2d at 1259 (citing Adler v. Wallace Computer Servs., Inc., 202 F.R.D. 666, 675 (N.D. Ga. 2001 (Story, J.)).

Here, Gatsby does not argue that reconsideration is warranted due to newly discovered evidence, or due to a change in law. Thus, the only possible basis for granting Gatsby's Motion for Reconsideration would be a need to correct a clear error of fact or law. Having reviewed Gatsby's arguments in support of its Motion for Reconsideration [Doc. 159], the Court finds no such error. On this basis, Gatsby's Motion for Reconsideration [Doc. 159] is DENIED.

**C. Gatsby's Motion to Submit Supplemental Report**

In its Motion to Submit Supplemental Report, Gatsby argues under Fed. R. Civ. P. 26(e)(2) and Fed. R. Civ. P. 37(c)(1) that the Court should allow it to supplement Chambers' expert report, or in the alternative, reopen discovery to allow Gatsby to designate an alternative expert witness [Doc. 160]. In response, Lift, Egenes, and Hash first argue that there is no report to supplement, and no right to file a supplement [Doc. 162 at 3-8]. They then argue that any supplemental report is, or will be, untimely, that allowing the supplement will cause them irreparable harm, and that reopening discovery approximates re-litigating the case and contravenes Local and Federal Rules [Id. at 8-17]. Finally, they argue that the Supplemental Report does not meet the Daubert standard [Id. at 17-20]. Lift, Egenes, and Hash thus request that the Court deny Gatsby's Motion to Submit Supplemental Report, and award them attorneys' fees for having to oppose the motion [Doc. 162 at 4, 21]. In reply, Gatsby argues that supplementing is allowed, and additional discovery would not delay the case [Doc. 165 at 1-13].

Fed. R. Civ. P. 26(e)(2) requires a party to supplement information provided in an expert report and in the expert's deposition. However, the requirement to supplement does not give a party the right to untimely supplement an incomplete expert report. In discussing another case in this Court, where the plaintiffs had tried to untimely supplement an expert report under Fed. R. Civ. P. 26(e), this Court said:

> The [Cochran] Court rejected the plaintiffs' argument, characterizing it as a "tortured and self-serving" interpretation of the rule in order to introduce evidence foreclosed by the Court's orders. The Court reasoned that the purpose of the report requirement and the Court's deadlines was to "end discovery and fix for the parties the evidence and opinions with which they would have to contend at trial so a trial could be fairly and efficiently conducted." The Court found that allowing the plaintiffs' tortured interpretation of Rule 26(e) would "hopelessly and unfairly frustrate[]" the rule's purpose and the Court's efforts.

In re Delta/Airtran Baggage Fee Antitrust Litig., 846 F. Supp. 2d 1335, 1356 (N.D. Ga. 2012) (Batten, J.) (quoting Cochran v. Brinkmann Corp., No. 1:08-CV-1790-WSD, 2009 WL 4823858, at *5 (N.D. Ga. Dec. 9, 2009) (Duffey, J.) (internal citations omitted)). Further, "[s]upplementation of an expert report pursuant to Rule 26(e) . . . 'does not cover failures of omission because the expert did an inadequate or incomplete preparation.'" Martinez v. Rycars Constr., LLC, No. CV410-049, 2010 WL 6592942, at *2 (S.D. Ga. Dec. 2, 2010) (quoting 3M Innovative Prop. Co. v. Dupont Dow Elastomers, LLC, Civil No. 03-3364(MGD/MJL), 2005 WL 6007042, at *4 (D. Minn. Aug. 29, 2005)).

Under Fed. R. Civ. P. 37(c)(1), a party who does not make the required expert disclosures may not use the expert at trial "unless the failure was substantially justified or is harmless." In addition to excluding the expert, the Court may order payment of attorneys' fees, inform the jury of the failure, or use other sanctions. Fed. R. Civ. P. 37(c)(1).

Here, Gatsby wishes to untimely supplement the report of its proposed expert, Thomas Chambers. It is worth noting as a preliminary matter that the Court has now twice excluded Thomas Chambers as an expert [Doc. 153 & Section III B, *supra*). Thus, there is arguably nothing to supplement. Assuming *arguendo* that Chambers' report could be supplemented, to allow Gatsby to do so at this point would further delay this case. Further, the deficits in Chambers' original expert report were entirely within Gatsby's and Chambers' control, and Chambers could have presented a complete expert report in the first place. Thus, the failures were not substantially justified. To allow Chambers to now untimely remedy deficits in his report would unfairly prejudice and harm Lift, Hash, and Egenes as the time to depose expert witnesses, and designate rebuttal expert witnesses has passed in this case.

In addition, even were the Court to allow Gatsby to supplement Chambers' report, the supplement would not be helpful. An expert's opinion is admissible if *inter alia* "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Chambers' Supplemental Report does not clearly and thoroughly explain what Chambers' opinions are, nor the methodology by which he arrived at those opinions [Docs. 160-1, 160-2, 160-3, 160-4, 160-5]. Thus, the Supplemental Report would likely be of little value to the average juror in deciding the issues at stake in this case.

For these reasons, Gatsby's Motion to Submit Supplemental Report [Doc. 160] is DENIED. Having denied Gatsby's Motion to Submit

Supplemental Report, the Court finds the additional penalty of awarding attorneys' fees to Lift, Hash, and Egenes is unwarranted.

Under Fed. R. Civ. P. 6(b), "the court may, for good cause" extend time "on motion made after the time has expired if the party failed to act because of excusable neglect." Thus, the Court's decision on whether to extend time hinges on whether failure to file within the original time was a result of excusable neglect. Excusable neglect is measured under a four-factor test. Those factors are: (1) the potential for prejudice to the nonmovant, (2) the length of the delay and its possible effect on the case, (3) the reason for the delay, and whether it was within the movant's reasonable control, and (4) whether the movant's actions were in good faith. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993) (citing In re. Pioneer Inv. Servs. Co., 943 F.2d 673, 677 (6th Cir. 1991)).

Discovery in this cased closed more than one year ago [Doc. 44]. Gatsby now seeks to reopen discovery to designate a new expert witness. However, the delay in submitting a complete expert report, and thus the reason for untimely filing to extend discovery, was entirely within the control of Gatsby and its proposed expert, Chambers. Chambers could have originally presented a complete, reliable expert report. Allowing Gatsby to now present a new expert would be highly prejudicial to Lift, Egenes, and Hash, especially now as the case is rapidly moving towards a trial. Further, reopening discovery at this point after this case has been in litigation for more than two years with litigation strategies presumably set and a trial date soon to be set, would delay a case that was rapidly approaching a final resolution. For these reasons, Gatsby's request to reopen discovery [Doc. 160] is DENIED.

**IV. Conclusion**

For the reasons stated above, the Court GRANTS Third-Party Defendants Egenes and Hash's Motion to Strike Third-Party Claims [Doc. 111] and GRANTS Egenes and Hash's Motion for Summary Judgment [Doc. 111] as to all claims against them as Third-Party Defendants. Defendant Gatsby's Motion for Reconsideration [Doc. 159] is DENIED. Defendant Gatsby's Motion to Submit Supplemental Report and alternative request to reopen discovery [Doc. 160] is DENIED.

Discovery in this case has closed [see Doc. 44], and the time to file dispositive motions has passed [see Doc. 79]. Egenes and Hash's Motion for Summary Judgment [Doc. 111] was the last pending motion for summary judgment in this case. Because the Court has now decided Egenes and Hash's Motion for Summary Judgment [Doc. 111], the parties in this case are DIRECTED, in accordance with LR 16.4, NDGa., to submit a Proposed Consolidated Pretrial Order within thirty (30) days of the date of entry of this Order.

SO ORDERED, this 21 day of March, 2017.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE